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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of HECTOR and DAUREEN SALVADOR	
HECTOR F. SALVADOR, JR., Respondent, v. DAUREEN T. SALVADOR, Appellant.	E048978 (Super.Ct.No. IND090716) OPINION

APPEAL from the Superior Court of Riverside County. Lawrence P. Best, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Honey Kessler Amado for Appellant.

Garrett C. Dailey for Respondent.

Appellant Daureen T. Salvador (Wife) appeals the trial court's order denying her motion to vacate or set aside the judgment entered pursuant to her and respondent Hector Salvador's (Husband) martial settlement agreement (MSA). Specifically, she contends

the court erred in failing to exercise its ostensible equitable authority to modify the spousal support provision of the judgment. We hold that the trial court had no such equitable authority and, therefore, acted appropriately in denying Wife's motion.

FACTUAL AND PROCEDURAL HISTORY

Husband and Wife were married on December 20, 1986, and separated on November 2, 2006. On March 12, 2007, they entered into a MSA; Husband was represented by counsel, Wife was not. At the time of the MSA, Wife worked as Vice President of Business Development at Tanner Companies, LLC (Tanner), earning an annual income of approximately $142,000. She was described in the MSA as being "49 years-old and in excellent health." Husband, on the other hand, was described as being "50 years-old and . . . in poor health." Husband suffered from a congenital autoimmune disease called ankylosing spondylitis for which he had received several surgeries. His spinal cord had collapsed and five cervical discs had been removed from his neck. Husband was self-employed with Global Internet Ventures, Inc., but received no income from his employment. Husband was not receiving any disability income and had expenses of $5,146 per month.

The MSA provided that husband would receive the home, Wife's 401(k) plan in the amount of $97,681.77, wife's IRA account in the amount of $41,686.80, a car, and other lesser accounts and personal possessions. Wife retained a car, her interest in a revocable trust, and other personal possessions. Husband retained liability for the

outstanding mortgage on the home while Wife incurred the $21,000 remaining debt on a charge card in her name.[1]

The most pertinent provisions of the MSA with regard to the substance of Wife's contentions in the instant case pertain to those regarding spousal support: "Wife will pay to Husband for spousal support each month 50 percent (50%) of Wife's gross income from employment, commencing June 1, 2007, payable every two (2) weeks by Wife to Husband, and continuing until the remarriage of Husband, or June 1, 2019, whichever occurs first. Wife currently receives bonuses twice per year from Tanner Companies, LLC. Wife must pay 50% of her gross bonus to Husband within 60 days of receiving it from her employer. The amount of spousal support payable by Wife may never be less than the sum of $3,000 for any particular month, up until June 1, 2019[,] or remarriage of Husband, whichever occurs first. . . . . No court will have jurisdiction to order such additional spousal support payable by Wife to Husband at any time, regardless of any circumstances that may arise." "Spousal support will be modifiable in amount, but only under the circumstances and to the extent set forth below. Spousal support will be nonmodifiable in duration. The amount of spousal support may be modified only in the event of Wife's permanent disability. For purposes of this provision, 'disability' is defined as 'inability to pursue any occupation because of physical or mental impairment.' If such a modification is ordered, subsequent modifications may also be ordered if further changes in Wife's condition warrant additional upward or downward modification."

[1] The home had an assessed current market value of $600,000 and an encumbrance of $173,000.

"The termination date of June 1, 2019[,] is absolute and will not be modifiable under any circumstances. Spousal support may not be requested for any period after June 1, 2019, nor will any court have jurisdiction to order spousal support to be paid for any period after June 1, 2019, regardless of any circumstances that may arise and regardless of whether any motion to modify spousal support is filed before, on, or after June 1, 2019." "Wife will provide to Husband, together with payment of spousal support each month, copies of any records provided by her employer concerning her gross income and deductions for the previous month, including but not limited to paycheck stubs. Within ten (10) days of receiving her W-2 from her employer, Wife is to mail a copy of her W-2 to Husband. Wife will also provide to Husband copies of any state or federal tax returns within ten (10) days from filing the return."

The agreement further provided that it "may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them." By its terms, the MSA was to be attached to the stipulated judgment. The court was requested to approve the entire agreement as fair and equitable and to merge the spousal support provisions into the judgment. On April 23, 2007, the court ordered the MSA incorporated into and made part of the judgment. It was filed on April 26, 2007.

On March 27, 2009, Husband's attorney sent Wife a demand letter requesting spousal support arrears in an amount of $33,247; it was alleged Wife had been paying half her net, rather than half her gross income. The letter also requested compliance with the term of the MSA that wife provide monthly paystubs, bonus records, and tax returns from June 1, 2007, to the current date. Husband's attorney sent a follow-up e-mail to

Wife on April 23, 2009, reiterating the demands of March 27, 2009, after having apparently received no response.

On April 22, 2009, Wife filed an order to show cause to set aside the judgment based on fraud in the inducement, perjury, and unenforceable and illegal provisions regarding spousal support pursuant to the provisions of Family Code section 2120 et seq.[2][3] Wife contended she was duped into believing that Husband's attorney was working for her as well. She maintained the MSA was heavily one-sided in favor of Husband. Moreover, she declared that the loss of her job in February 2009 meant that she was incapable of complying with the judgment's provision that she pay a minimum of $3,000 a month to Husband.

In his responsive declaration, Husband contended the spousal support provisions of the MSA were nonmodifiable pursuant to section 3651, subsection (d); therefore, the court had no authority to modify those provisions. Moreover, Husband noted that pursuant to section 2123, a judgment may not be set aside because the court finds it was inequitable when made or that subsequent circumstances caused it to be inadequate. Husband's income and expense report (I&E) reflected that he continued to garner no

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[2] All further statutory references are to the Family Code unless otherwise indicated.

[3] As agreed to by the parties, we cite to the respondent's appendix for the substance of several documents filed in the court below. In his respondent's brief, Husband maintained that copies of these documents submitted by Wife in her appellant's appendix contained attachments and interlineations not included in the originals on file with the court. Wife admitted in her reply brief that she had involuntarily included such nonconforming documents in her appendix and that we should rely on respondent's appendix for the accuracy of those filings.

income. Wife attached to her I&E pay stubs for the period between January 9, 2009, and April 11, 2009, which reflected that she had earned a gross income of $4,357.69 every two weeks between January 9, 2009, and February 6, 2009; earned $2,178.85 and received severance pay of $2,178.85 on February 20, 2009, and received severance in the amount of $4,357.69 every two weeks over the course of the following six weeks.

On June 2, 2009, the court heard oral argument on the matter. On June 8, 2009, it issued its statement of decision; the court denied the motion to vacate the judgment and/or sever the provision regarding spousal support. The court found no evidence of fraud, duress, coercion or perjury. "[Wife] was not kept in ignorance or prevented from fully participating in the process. The marital settlement agreement clearly sets out the state of the parties' legal representation, and the rights of [Wife] to seek independent counsel." "Any perceived inequity in the judgment is not determinative pursuant to Family Code Section 2123."

DISCUSSION

A. MOTION TO DISMISS

Husband contends this court should dismiss wife's appeal because of her failure to make court ordered spousal support payments. He notes that from June 28, 2007, through September 28, 2009, she has never made full payment of her spousal support obligations. Husband attaches an "arrearage report," a spreadsheet ostensibly recounting wife's spousal support payment history. The report reflects an initial monthly payment of $5,300 on June 28, 2007, several monthly payments of $4,500, numerous monthly payments of $3,000, two months in which no payments were made (July and August

2009), and a final payment of $750 in September 2009. In his motion, Husband notes that wife also made a $750 payment in October 2009. Husband maintains that Wife was paying either 50 percent of her *net* income or the stipulated minimum of $3,000 even when working despite the fact that the MSA provided for payments of 50 percent of her *gross* income. He further notes that the nonpayments in July and August 2009, and the $750 payments made in the months of September and October 2009, were far below the stipulated minimum of $3,000.

Wife does not contest the amounts of support Husband has alleged she has or has not paid. However, Wife responds that "[a]t the time of entering into the Judgment, I understood 'gross earnings' to mean earnings after taxes but before any elective deductions for such benefits as retirement or health insurance." Thus, she maintains that the spousal payments she made while she was employed with Tanner were in compliance with the MSA. She notes that her employment with Tanner ended in February 2009. In "mid 2009" she accepted a position in Chicago with monthly earnings after taxes, but before voluntary deductions, of approximately $4,500. She asserts her expenses are $3,500 a month. Of the remaining $1,000 she has been paying $750 to Husband.

"It is well settled that this court has the inherent power to dismiss an appeal by any party who has refused to comply with orders of the trial court. [Citations.] . . . 'A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state. [Citations.]' No judgment of contempt is required as a prerequisite to our exercising the power to dismiss. [Citations.] The power to dismiss an

appeal for refusal to comply with a trial court order has been exercised in a variety of circumstances, including[:] where a husband had failed to pay alimony as ordered in an interlocutory judgment of divorce [citation] . . . ." (*TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377, 379-380.)

We agree with Wife that Husband's citations in support of dismissal are distinguishable from the present case. In those cases the offending individuals voluntarily elected not to comply with the trial courts' orders despite being capable of doing so. (*TMS, Inc. v. Aihara, supra*, 71 Cal.App.4th at p. 380 [defendants "willfully refused to comply with the trial court's order"]; *Stone v. Bach* (1978) 80 Cal.App.3d 442, 448 [defendant's "intolerable," "deliberate" refusal to comply with trial court's orders justified dismissal]; *Kottemann v. Kottemann* (1957) 150 Cal.App.2d 483, 487-488 ["Appellant is plainly and persistently in contempt of the superior court in the very matter of this appeal" by refusing to pay support obligations despite his ability to do so.].)

In the instant case wife contends her initial underpayments of her spousal support obligations were the result of her misunderstanding of the meaning of the terms of the MSA. In the very least, wife was actually making payment, albeit underpayments, of her spousal support obligations between June 2007, and June 2009, apparently even after she lost her job with Tanner. Wife apparently only missed two months of payments when she was unemployed in July and August 2009. According to Wife, her payment of $750 per month during the ensuing two months was all she could afford to make. Thus, wife's nonpayment of spousal support in its entirety does not appear to be a contumacious refusal to abide by the trial court's order, but an attempt to comply with the order to the

best of her limited ability.[4] Therefore, we will err in favor of deciding the appeal on its merits. (*Lee v. Brown* (1976) 18 Cal.3d 110, 113.)[5]

B. FORFEITURE

Husband contends Wife's purported failure to raise the family court's equitable power to modify the spousal support award below forfeited her right to raise the issue on appeal. We hold that Wife sufficiently raised the issue below to preserve the contention on appeal.

"'"No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' [Citation.]" [Citation.]' [Citation.]" (*In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, 1558.)

Under "point four" in Wife's order to show cause to set aside the judgment, wife cited section 2128, subsection (c) for the proposition that "'[n]othing in this Chapter restricts a Family Law Court from acting as a court of equity.'" Wife argued that the

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[4] Our determination that wife has not contemptuously failed to make her court ordered support payments is based solely upon the allegations made by Husband, which were not made under penalty of perjury. Thus, our "finding" should hold no weight in any subsequent proceedings regarding the matter where a higher evidentiary standard would be required. Likewise, our "finding" is limited to our determination that we should proceed on the merits of the appeal. Therefore, no subsequent court in rendering a finding on the same factual issue for any other legal purpose should feel bound by our determination.

[5] On December 4, 2009, this court reserved ruling on respondent's motion to dismiss for consideration with the appeal. The motion is denied.

spousal support provision of the judgment could be deemed severable from the order in its entirety. Wife maintained, "The court has the equitable power to . . . [¶] . . . [¶] [v]acate the spousal support payment provision and issue new orders." While we agree with Husband that Wife's equitable contention below was supported by neither case citation nor by substantive factual argument on the issue, we, nevertheless, deem the issue preserved for appeal.

Husband's case citations to the contrary all deal with the failure of a party to support an issue by "argument, citation of authority or record reference establishing that the points were made *below*," i.e., argument made *in the appellate court*. (*Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228, italics added; see also *Dahl-Beck Electrical Co. v. Rogge* (1969) 275 Cal.App.2d 893, 902; *In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164.) Here, Wife did cite statutory authority for her contention below. Moreover, she argued, albeit superficially, how that authority should be applied to her case. Finally, Wife's maintenance of the issue below was in a trial court proceeding, not in the appellate court. Thus, Husband's case citations are distinguishable and the issue has been sufficiently preserved for appeal.

C. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING WIFE'S MOTION TO SET ASIDE THE JUDGMENT

We review the denial of a motion to set aside a judgment pursuant to section 2120 et seq. for abuse of discretion. (*In re Marriage of Rosvear* (1998) 65 Cal.App.4th 673, 682-683.) Section 2120 et seq. applies to family court judgments deemed inequitable "due to the nondisclosure or other misconduct of one of the parties." (§ 2120, subd. (b).)

Thus, litigants may seek relief from a judgment based on fraud, perjury, duress, mental incapacity, failure to comply with mandatory disclosure, or mistakes of fact or law. (§ 2122.) "A judgment may not be set aside simply because the court finds that it was inequitable when made, nor simply because subsequent circumstances caused the division of assets or liabilities to become inequitable, or the support to become inadequate." (§ 2123.) Nevertheless, "[n]othing *in this chapter* is intended to restrict a family law court from acting as a court of equity." (§ 2128, subd. (c).)

"Section 2123 is plain that where the only reason to set aside a judgment is that it was 'inequitable when made,' the trial court is affirmatively commanded *not* to set the judgment aside under 'any' law." (*In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 33.) "[Section 2123] leaves a trial court with no discretion to grant a motion based solely on an imbalance or 'windfall' theory." (*Id*. at p. 34.) "[T]he naked lopsidedness of the deal in hindsight" is not enough under section 2123 to warrant setting aside the judgment. (*Id*. at p. 36.)

The court determined that there was no evidence of fraud, duress, perjury, coercion, force, or failure of Husband to disclose material financial information. The record fully supports the court's findings; indeed, Wife made nary an allegation of any such misconduct on the part of Husband. Wife's sole contention below regarding misconduct related to Husband's attorney's ostensible joint representation of both her and Husband. However, the court found that Wife "was not kept in ignorance or prevented from fully participating in the process. The marital settlement agreement clearly sets out the state of the parties' legal representation, and the rights of [Wife] to seek independent

legal counsel." The record supports this determination. Item No. 47 of the MSA is entitled "**ONE PARTY UNREPRESENTED BY COUNSEL**," written in bold, all capital letters. It is the last item in the MSA before the signature page. Its contents read as follows: "This Agreement has been prepared by Juliene Lee Ash, attorney for Husband. Wife has not been represented in the negotiation or preparation of this agreement. Wife acknowledges that Husband's attorney has informed her that the attorney represents only Husband, that Wife has the right to obtain independent legal advice, and that Wife should do so, but that she has voluntarily declined to obtain such advice. Wife further acknowledges that she has carefully read this agreement in its entirety and is fully aware of the contents and the legal effect thereof and voluntarily chooses to execute it." Thus, because Wife failed to allege any substantiated misconduct upon the part of Husband or his attorney, the court acted within its discretion in denying her motion to set the judgment aside.

On appeal, as she did below, Wife argues that the judgment strongly and unconscionably favored Husband. However, as the family court properly found "[a]ny perceived inequity in the judgment is not determinative pursuant to Family Code [s]ection 2123." The family court accurately viewed the judgment entered pursuant to the MSA prospectively from the time the agreement was made rather than retrospectively as Wife would have had it do.

Wife contends that the court's equitable jurisdiction preserved under section 2128, subsection (c), and the express bar in section 2123 on setting aside judgments deemed inequitable when made, are inherently conflicting such that this court must interpret the

statutes and discern which of the two ostensibly competing statues is controlling in this instance. However, in Wife's reply brief she maintains the two statues "co-exist," asserting the court's equitable power to set aside the judgment persists despite the provisions of section 2123. It is obvious that the two statutes do not conflict and that they co-exist, though not in the manner exposited by Wife.

Section 2128, subsection (c) permits the court to act in equity regarding the bases for setting aside the judgment enumerated in section 2122, i.e., fraud, perjury, duress, mental incapacity, failure to comply with mandatory disclosure, or mistakes of fact or law. However, section 2123 explicitly bars the court from setting aside the judgment based on any perceived inequity when the agreement was entered into. Thus, the family court's equitable authority is limited to those bases enumerated in section 2122 for setting aside the judgment, i.e., it does not extend to any determination that the agreement was inequitable when entered into.

Wife finally contends that section 2123 is not applicable to her request because no one is arguing that the spousal support has become *inadequate*. "A judgment may not be set aside simply because the court finds that it was inequitable when made, nor simply because subsequent circumstances caused the division of assets or liabilities to become inequitable, *or the support to become inadequate*." (§ 2123, italics added.) Rather, she contends the spousal support award has become too onerous. Thus, she maintains that section 2123 did not foreclose the court's discretion to set aside the spousal support award in equity.

First, as noted above, a motion to set aside the judgment pursuant to section 2120 et seq. may be granted only when a judgment is deemed "inequitable *when made* due to the nondisclosure or other misconduct of one of the parties." (§ 2120, subd. (b), italics added.) Although looking prospectively from the time the judgment was entered, one could certainly deem it imbalanced; this, in and of itself, is an insufficient ground to set aside the judgment. (*In re Marriage of Heggie*, *supra*, 99 Cal.App.4th at p. 34.) Moreover, the court acted well within its discretion in determining that no misconduct had occurred. Furthermore, Wife would have the court look retrospectively at the judgment with all the benefit of the knowledge that she lost her job after the judgment was entered. This is specifically verboten by the statue which provides relief only when the judgment was inequitable when made.

Second, as we will discuss below, the terms of the MSA specifically delineated the circumstances in which a modification of the spousal support award could occur. Nowhere in that agreement did it permit a reduction in the spousal support amount if Wife became unemployed or she received reduced earnings. While in hindsight wife should have insisted upon such a provision, neither this court nor the court below has the power to disregard the stated intentions of the parties in their negotiated MSA. (*In re Marriage of Sasson* (1982) 129 Cal.App.3d 140, 147 [equity cannot compel a result in contravention of parties' intentions when they entered into a MSA]; See also *In re Marriage of Harris* (1976) 65 Cal.App.3d 143, 151-152; *In re Marriage of Rabkin* (1986) 179 Cal.App.3d 1071, 1081.)

D. THE FAMILY COURT HAD NO EQUITABLE AUTHORITY TO MODIFY THE SPOUSAL SUPPORT PROVISION OF THE JUDGMENT

Wife contends the family court erred to the extent it believed it did not have equitable authority to modify the spousal support agreement.

"We review de novo any questions of law, and the application of that law to the facts . . . . [Citation.]" (*Gagan v. Gouyd* (1999) 73 Cal.App.4th 835, 839 [Fourth Dist., Div. Two], disapproved on other grounds in *Mejia v. Reed* (2003) 31 Cal.4th 657, 669, fn. 2.)

"An agreement for spousal support may not be modified or revoked to the extent that a written agreement, or, if there is no written agreement, an oral agreement entered into in open court between the parties, specifically provides that the spousal support is not subject to modification or termination." (§ 3591, subd. (c).) "An order for spousal support may not be modified or terminated to the extent that a written agreement, or, if there is no written agreement, an oral agreement entered into in open court between the parties, specifically provides that the spousal support is not subject to modification or termination." (§ 3651, subd. (d).)

In determining whether there have been sufficient "changed" circumstances to support a modification of a spousal support order, the trial court is bound to give effect to the parties' intent and reasonable expectations as expressed in the underlying agreement or stipulated judgment. In other words, when a support order is based on the parties' MSA, the family court's discretion is constrained by the terms of the agreement; it cannot remake the agreement in ways inconsistent with the parties' expectations. (*In re*

Marriage of Aninger (1990) 220 Cal.App.3d 230, 238, superseded by statute on another point as indicated in *In re Marriage of O'Connor* (1997) 59 Cal.App.4th 877, 882-883; *In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 398-399.) Equity cannot compel a result in contravention of the parties' intentions when they entered into a MSA. (*In re Marriage of Sasson, supra*, 129 Cal.App.3d at p. 147; See also *In re Marriage of Harris, supra*, 65 Cal.App.3d at pp. 151-152; *In re Marriage of Rabkin, supra*, 179 Cal.App.3d at p. 1081.)

Here, the terms of the judgment explicitly forbade modification by the court in any manner except those expressly delineated therein. "The amount of spousal support payable by Wife may never be less than the sum of $3,000 for any particular month, up until June 1, 2019[,] or remarriage of Husband, whichever occurs first." "Spousal support will be modifiable in amount, but only under the circumstances and to the extent set forth below." "The amount of spousal support may be modified only in the event of Wife's permanent disability." "If such a modification is ordered, subsequent modifications may also be ordered if further changes in Wife's condition warrant additional upward or downward modification." The MSA clearly prohibited modification for any reason other than Wife's disability. Wife has not alleged any disability; thus, the court properly refused to modify the support award.

Wife contends that regardless of any intent by the parties to bar modification of the amount of the spousal support, the court, nevertheless, had authority under section 2128, subsection (c) to act in equity to right any perceived unjustness in the award. She contends that because the judgment did not provide any mechanism for reducing the

spousal support award should she lose her job or suffer reduced earnings, it was per se inequitable. Thus, she argues the trial court abused its discretion in failing to recognize or exercise its discretion to act in equity.

Wife's argument fails because section 2128, subsection (c), by its own terms, does not negate the provisions in sections 3591, subdivision (c) and 3651, subdivision (d), that is: "Nothing *in this chapter* is intended to restrict a family law court from acting as a court of equity." (§ 2128, subd. (c), italics added.) Neither sections 3591 or 3651 are in the *same chapter or division* as section 2128. Thus, the court was constrained by the terms of the MSA and could not exercise its own judgment in equity to modify the spousal support award.

Wife contends she is not using section 2128 to sidestep sections 3591 or 3651, however this is precisely what she is doing. Wife confuses a motion to set aside the judgment with a motion for modification of spousal support. They are two separate procedures for obtaining separate results. Having failed to convince the lower court of any misconduct by Husband, such that the judgment should be set aside as inequitable, she attempts to use a statute limited to that procedure to obtain a modification of the support order, a result directly at odds with the MSA and the statutes regulating such a modification. Section 2128, subdivision (c)'s invocation of equitable powers for the family court is limited by other statutes outside of that chapter. Thus, the lower court had no authority in equity to disregard the terms of the MSA limiting the circumstances in which it could modify the spousal support award.

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ MILLER
J.

We concur:

/s/ McKINSTER
Acting P. J.

/s/ RICHLI
J.